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State of Utah v. Christina L. Gray and Mark J. Gray : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

Case No. 20050136-CA

CHRISTINA L. AND MARK T. GRAY,

Defendants/Appellants.

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR CHILD ABUSE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-109(2)(a) (WEST 2004), IN THE THIRD JUDICIAL DISTRICT COURT IN SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ROBIN W. REESE PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **CHRISTINA L. AND MARK J. GRAY,** **Defendant/Appellant.**	**Case No. 20050136-CA**

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Defendants appeal their conviction for child abuse, a second felony, in violation of Utah Code Ann. § 76-5-109(2)(a) (West 2004), in the Third Judicial District Court in Salt Lake County, State of Utah, the Honorable Robin W. Reese presiding. This Court has jurisdiction to consider the petition pursuant to Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issues 1 and 2: Were defendants' trial attorneys ineffective in (1) not requesting a lesser-included offense instruction and (2) not retaining an expert to provide psychiatric testimony on the mental states of both defendants?

Standard of Review for Both Issues: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness. *State v. Clark,* 2004 UT 25, ¶ 6, 89 P.3d 162.

Issue 3: Did instructing the jury that "[p]roof beyond a reasonable doubt is that degree of proof that . . . obviates all reasonable doubt" violate defendant's due process rights?

Standard of Review: "Whether [a jury] instruction correctly states the law is reviewable under a correction of error standard, with no particular deference given to the trial court's ruling." *State v. Archuleta*, 850 P.2d 1232, 1244 (Utah 1993) (footnote omitted), *cert. denied*, 510 U.S. 979 (1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are relevant to this appeal:

Utah Code Ann. § 76-5-109 (West 2004):

> (2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:
>
> (a) if done intentionally or knowingly, the offense is a felony of the second degree;
>
> (b) if done recklessly, the offense is a felony of the third degree; or
>
> (c) if done with criminal negligence, the offense is a class A misdemeanor.

Utah Code Ann. § 76-2-103 (West 2004):

> A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly,

> or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> * * *
>
> (4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

STATEMENT OF THE CASE

Defendants, Christina L. Gray and Mark J. Gray ("defendants" or "the Grays"), were charged with child abuse, a second degree felony in violation of Utah Code Ann. § 76-5-109 (West 2004). CGP at 4; MGP at 5.[1] A jury found them guilty as charged. CGP at 83; MGP at 74. The trial court sentenced each of them to an indeterminate prison term of one to fifteen years. CGP at 123-125; MGP at 113-115. The court suspended the prison terms, placed them on probation for three years, and ordered each of them to serve a six-month jail term. *Id.* The court ordered that Christina begin serving her jail term on January 17, 2005, and that Mark begin serving his term on July 15, 2005. *Id.*

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[1] The State refers to the pleadings volume in Christina Gray's case as CGP, the pleadings volume in Mark Gray's case as MGP and the trial transcripts as TT.

STATEMENT OF FACTS

Chained in the basement, "[a]ll day and all night"

J.G. was 10 or 11 years old when his father, Mark Gray, and stepmother, Christina Gray, began chaining him to a cinder block on the cement floor in the basement of their Magna home. TT 118, 138-39, 233-35. While defendants released J.G. to go to school and to come upstairs for his meals, he spent a large amount of his time in restraints. TT 234-236, 241. J.G. testified that his father sometimes took him upstairs to eat, but that he otherwise spent "[a]ll day and all night" chained in the basement. TT 236. Defendants often kept him in his underwear on the cement floor of the laundry room hallway with access to little more than a rug and a blanket. TT 239-40.

J.G. claimed that Christina sometimes threw water and turned a fan on him while he was chained and that she sometimes hit and kicked him. TT 239, 241. He also claimed that Christina struck him with a board, and threw jalapeno pepper juice in his eyes. TT 241-42, 270. He told the jury that when the family went to a drive-in movie, Christina would sometimes put a sheet over his head so he could not see the screen. TT 246. "She says she hates me." TT 242.

J.G. claimed Christina repeatedly stabbed at him with a fork and showed one investigator a scar with four dots, three in a line and one slightly offset. TT 160. The investigator stated that the dots were consistent with a fork. *Id.* J.G. pointed to the unaligned dot and explained that one prong of the fork was bent. *Id.*

J.G. also told the investigator that he had hidden a jar of peanut butter in the basement because he "was hungry and Christina wasn't feeding [him]." TT 134, 237. During a later search, the investigator found the jar where J.G. said he had placed it, "a place where you couldn't get to unless he described it." TT 160.

Tic-tac-toe

Numerous witnesses confirmed that J.G. was in fact chained in the basement. Family friend Alyce Johnson first saw him chained in the basement in the summer of 2002. TT 37-38. When Alyce went to the Gray home eight months later, she saw J.G. in the living room, "sitting at the table." TT 44. "[H]e didn't have a shirt on and he had tic-tac-toe on his face and he had writing across his back." *Id.* He was "embarrassed because [he was] in his underwear and his feet [were] handcuffed." TT 45. Christina told her that the writing on J.G.'s back was his address. TT 53. Christina said that Colleena, a teenager who lived with the family, had put the tic-tac-toe on J.G.'s face.[2] TT 57. Christina said that Colleena "likes to cause problems." *Id.*

In approximately September 2003, Alyce again saw J.G. in the basement. He was sitting in the hallway area in his underwear. TT 46. He had "a dirty pillow next to him, some books next to him and a chain on his ankle." TT 47. This time, Alyce called child protective services. *Id.*

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[2] Colleena denied that she had written the tic-tac-toe sign. TT 422.

J.G. is taken into custody

On October 1, 2003, patrol officer Michael Lee went to the Gray home and asked to speak to J.G.'s parents. TT 73, 75. When told that the parents were not home, Officer Lee asked to see J.G. *Id.* A teenage girl invited the officer in and went to get J.G. *Id.* When she returned with J.G., she had a pair of handcuffs in her hands. TT 76. The detective also went to the basement where he found a piece of chain connected to a cinderblock in a hallway near the laundry room. TT 82-83. He saw a braided rug, a thin pillow, some books, and a towel, but no blankets or mattress. TT 83, 85. When he asked the children "what [the area] was for," they told him "that's where they had to chain up [J.G.] because he ran away." TT 86.

Defendant Mark Gray admitted to Detective Lee that he and Christina used a chain to restrain J.G. *See* TT 87, 159. Mark or Christina said that "Deputy [James] Timpson had told them that that's what they needed to do, is chain him up with handcuffs." *Id.* at 94.[3] Mark told Detective Lee that they had been handcuffing J.G. for "about a month." *Id.* at 98. This was over a year after Alyce had first observed J.G. in chains and Christina had told her that he "had come home from running away and that she had chained him down in the basement." TT 37-38. Christina and Mark had also told their friend and neighbor Jean Woolston about the chaining. TT 456. They said that "[J.G.] ran away all the time and they didn't know what to do." *Id.* As Deputy Lee placed J.G. in the patrol car for transport,

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[3] When Deputy Timson testified, he denied that he had a discussion with defendants about chaining J.G. TT 308.

neither defendant hugged him. TT 88, 102. As J.G. was leaving, Mark Gray tapped him on the shoulder and said "Goodbye, Jeff." TT 103. Christina Gray did nothing. *Id.*

Defendants' story

Defendants claimed that they kept J.G. in his underwear to prevent his running away. TT 314. J.G. had academic and behavioral difficulties at school. *See* TT 323-389 (testimony of school resource teacher, school social worker, school principal). At home, "he was hard to deal with" and "made . . .life miserable." TT 41. Christina told her friend that she hated J.G. TT 40. J.G. ran away repeatedly. TT 253. Defendants attempted to control his behavior in various ways, but eventually determined to restrain him.

Teachers, social workers and even the principal at J.G.'s elementary school all testified to his discipline problems and propensity for running away. *See, e.g.,* TT 330, 347, 362. The school's principal ranked J.G.'s disciplinary problems as "among my top three" in 11 years of school administration. TT 371. The principal also described the Grays as "very good. They recognized the problem." TT 359. "They were very responsive to a kid that was in crisis." TT 380. A neighbor described Christina Gray as a normal "stay-at-home mom[]" who treated J.G. just like the other children. TT 447, 449-51.

Coleena Norman, a teenager who lived with the Grays for about six months in 2003, testified that J.G. was chained intermittently over a three-month period and only when adults were not present to prevent him from running away. TT 423. Jason Kass, another family friend who lived for a time with the Grays, stated that he saw J.G. chained "very few times." TT 431. He also testified that he never saw Christina beat or stab J.G. and that when she did

punish him it was only by taking privileges away. TT 432. He also said that he had accompanied the Gray family to the drive-in and that he never saw Christina place a blanket or towel over J.G.'s head. TT 434.

SUMMARY OF ARGUMENT

Point I: Defendants' trial attorneys were not ineffective for not requesting a lesser-included offense jury instruction on class A misdemeanor child abuse. First, trial counsels' performance evinces a legitimate trial strategy—gaining acquittal for their clients—and therefore cannot support an ineffective assistance of counsel claim. Second, the defendants were not entitled to a lesser-included offense instruction because the evidence did not support an acquittal on the greater charge and a conviction on the lesser. Third, defendants suffered no prejudice because they would have been convicted of felony child abuse even if the instruction had been given.

Point II: Defendants' trial attorneys were not ineffective in not presenting expert testimony on their mental states. First, testimony on the mens rea of a defendant at the time of the offense is inadmissible under the rules of evidence. Second, counsel's decisions concerning which witnesses to call for trial are classic strategic decisions that cannot support a claim of ineffective assistance.

Point III: The jury instruction on reasonable doubt correctly states the law, even though it uses the phrase "obviates all reasonable doubt." First, defendants cannot pursue this claim on appeal because any error was invited through defense counsel's affirmation of the jury instructions. Second, defendants cannot raise this claim for the first time on appeal.

Because they cannot demonstrate exceptional circumstances warranting review of an unpreserved claim, it should not be considered. Third, even on the merits, this claim fails because the prosecutor did not misstate the burden of proof by arguing that the State need only obviate doubts that are "sufficiently defined." Finally, the instructions, taken as a whole, properly instructed the jury on reasonable doubt.

ARGUMENT

I. DEFENDANTS' TRIAL ATTORNEYS WERE NOT INEFFECTIVE FOR NOT REQUESTING A LESSER-INCLUDED OFFENSE JURY INSTRUCTION.

Defendants argue that they received ineffective assistance because their trial attorneys did not request a lesser-included offense jury instruction. Aplt. Br. at 29. This claim fails.

To show ineffective assistance of counsel, a defendant must establish both prongs of the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which holds that such claims succeed only if the defendant demonstrates: (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's performance prejudiced the defendant. *Id.* at 687-88; *see also State v. Strain*, 885 P.2d 810, 814 (Utah App.1994). A defendant's burden is extremely high. An ineffective assistance claim can "succeed[ ] only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *State v. Perry*, 899 P.2d 1232, 1241 (Utah App.1995) (citation and quotations omitted). Moreover, "proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993) (footnote citations omitted).

When a defendant claims ineffective assistance of counsel, it is not enough to show that his or her counsel's performance could have been better. The Sixth Amendment entitles a criminal defendant "only to effective assistance of counsel, not to the best or most complete representation available." *State v. Tyler*, 850 P.2d 1250, 1259 (Utah 1993); *see also Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999) (counsel's performance is deficient only if petitioner shows it was "completely unreasonable, not merely wrong").

As demonstrated below, defendants do not meet their burden to establish ineffective assistance of counsel.

A. Trial Counsel's Performance Was Not Deficient Because It Reflected a Legitimate Trial Strategy.

Defendants' claim that their trial attorneys were deficient because they did not request a lesser-included offense instruction is refuted by the fact that counsel's performance at trial evince a legitimate trial strategy—to gain acquittal for their clients.

A decision to seek acquittal rather than face the risk of conviction on a lesser-included offense is a reasonable trial strategy. *See, e.g., State v. Hall*, 946 P.2d 712, 723 (Utah App. 1997) (counsel's decision not to request a lesser-included offense instruction consistent with trial strategy and does not constitute ineffective assistance), *cert. denied* 953 P.2d 449 (Utah 1998); *Benefield v. State*, 557 S.E.2d 476, 478-79 (Ga. App. 2001) ("Counsel's decision not to request a jury charge on a lesser included offense and to pursue an 'all or nothing' defense is a matter of trial strategy and does not amount to ineffective assistance"); *State v. Griffie*, 658 N.E.2d 764, 765 (Ohio 1996) ("[f]ailure to request jury instructions on lesser-included

offenses is a matter of trial strategy and does not establish ineffective assistance of counsel") (citation omitted).

In *State v. Hall*, this Court considered a claim of ineffective assistance by a defendant who had been convicted of aggravated sexual abuse of a child. *Hall*, 946 P.2d at 715. Hall claimed on appeal that his attorney's performance was deficient because he should have requested jury instructions on certain lesser-included offenses. *Id.* This Court had no difficulty disposing of Hall's claim because requesting a lesser-included offense would contradict the defense's theory of the case, *i.e.*, that the charges were fabricated:

> Defense counsel's failure to request the instructions . . . is entirely consistent with his trial strategy. Defense counsel argued throughout trial that A.C. was lying about the alleged abuse, and suggested that A.C.'s mother had devised the allegations. Thus, defense counsel's request for instructions on lesser included offenses would have been inconsistent with his assertion that defendant never touched A.C.

Id. at 723.

Similarly, here, defendants' strategy was that they were blameless. Part of that strategy involved attacking J.G.'s credibility by suggesting through the testimony of various witnesses that he was lying or at least exaggerating his allegations against his parents. J.G. testified that he was chained to a cinder block on the floor in the basement hallway "for a long time," " all day and all night." TT 235-36. He claimed Christina, his stepmother, beat him, stabbed him with a fork, placed a sheet over his head at a drive-in movie so he could not see and forced him to sleep on the floor in water with a fan blowing on him. TT 239, 241, 242, 246. The defense disputed these allegations through testimony from family friends. For example, Coleena Norman, a teenager who lived with the Grays for about six

months in 2003, testified that J.G. was chained only intermittently over a three-month period and only when adults were not present to prevent him from running away. TT 423. Jason Kass, another family friend who lived for a time with the Grays, stated that he saw J.G. chained "very few times." TT 431. He also testified that he never saw Christina beat or stab J.G. and that when she did punish him it was only by taking privileges away. TT 432. He also said that he had accompanied the Gray family to the drive-in and that he never saw Christina place a blanket or towel over J.G.'s head. TT 434.

Defendants' "all or nothing" strategy was also evident in their attempts to advance a "mistake of law" defense by arguing that they honestly and reasonably believed they were acting responsibly and *legally* in restraining J.G. to prevent him from running away. Defendants claim their belief was reasonable because Salt Lake County Sheriff's Deputy James Timpson, who met with the Grays early on to discuss methods to keep J.G. from running away, allegedly endorsed the chaining. *See, e.g.,* TT 491-92. Deputy Timpson denied making such a statement, TT 309, but defendants' version was at least partially corroborated by Ernest Broderick, J.G.'s school principal, who was present during the meeting with Timpson. According to Broderick, Christina told Timpson that J.G. was so fast that she felt like she "almost needed to handcuff him to [her]." TT 365. Broderick recalled Timpson telling Christina that handcuffing J.G. to her would "probably be reasonable under those circumstances and I believe I agreed with it too. . . ." TT 365-66.

The "mistake of law" defense was also embodied in Jury Instruction 20, which states:

> You are instructed that ignorance or mistake concerning the existence of a penal law is no defense to a crime unless:

1. Due to his or her ignorance or mistake, the actor reasonably believed his or her conduct did not constitute an offense, and

2. His or her ignorance or mistake resulted from the actor's reasonable reliance upon:

   a. An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question;

   or

   b. A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

MGP 96; CGP 105.

Finally, this strategy was also evident in the defendants' attempts to portray themselves as earnest, caring parents who were at their wits' end in attempting to deal with a child who was deeply disturbed due to the abuse inflicted on him by his birth mother, who had custody of him until he was five years old. Teachers, social workers and even the principal at J.G.'s elementary school all testified to his discipline problems and propensity for running away. *See, e.g.,* TT 330, 347, 362. The school's principal ranked J.G.'s disciplinary problems as "among my top three" in 11 years of school administration. TT 371. The principal also described the Grays as "very good. They recognized the problem." TT 359. "They were very responsive to a kid that was in crisis." TT 380. A neighbor described Christina Gray as a normal "stay-at-home mom[]" who treated J.G. just like the other children. TT 447, 449-51.

Clearly, counsel's trial strategy was to have their clients exonerated. Through testimony of houseguests, neighbors and school officials, the Grays attempted to portray themselves as concerned parents coping as best they could with a disturbed child. Testimony concerning J.G.'s alleged propensity to lie or exaggerate and the alleged alleaged endorsement of chaining J.G. to restrain him both suggest a defense strategy aimed at the entirely reasonable goal of acquittal. A lesser-included offense instruction would have been inconsistent with this strategy because it would entail an admission of guilt. Because the performance of the defense attorneys reflects a reasonable trial strategy, they cannot be found ineffective for taking actions that would be inconsistent with that strategy.

B. The Defendants Have Not Shown Prejudice From Their Counsel's Alleged Deficient Performance Where They Have Not Demonstrated That (1) They Were Entitled to the Lesser-included Offense Instruction or (2) There Is a Reasonable Probability of a Different Result If the Instruction Had Been Given.

Defendants have not shown prejudice. Defendants claim the jury should have been given the lesser-included offense instruction because jurors should have been given the option of convicting them of class A misdemeanor child abuse, an offense they now believe would have been more appropriate because they believed that chaining J.G. in the basement was necessary to keep him from harming himself by running away. *See, e.g.,* Aplt. Br. at 32. Thus, they claim their attorneys erred in not requesting a lesser-included offense instruction.

This argument fails, first, because they were not entitled to the lesser-included offense instruction and, second, because the Grays would still have been convicted of felony child abuse even if the instruction had been given.

In Utah, "[a] defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; . . ." Utah Code Ann. § 76-1-402(1) (West 2004). A defendant may be convicted of a charged offense or a lesser-included offense, but not both. Utah Code Ann. § 76-1-402(3) (West 2004). An offense is a lesser-included offense if "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . ." Utah Code Ann. § 76-1-402(3)(a) (West 2004).

When a defendant requests a lesser-included offense instruction, the trial court need not grant the request "unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Utah Code Ann. § 76-1-402(4) (West 2004). Thus, to make this determination, the trial court must perform a two-part analysis. "First, the trial court must determine whether the offense for which the defendant seeks instruction is a lesser included offense of the crime charged. . . . Second, the trial court must determine whether a rational basis exists on which the jury could acquit the defendant of the offense charged and convict of the lesser offense." *State v. Payne,* 964 P.2d 327, 332 (Utah App. 1998) (citing *State v. Baker,* 671 P.2d 152 (Utah 1983) (additional citations omitted)).

But even if there is a rational basis for the instruction, reversal is not required if the defendants suffered no prejudice. *Id.* at 334. "For an error to require reversal, 'the likelihood

of a different outcome must be sufficiently high to undermine confidence in the verdict.'" *State v. Jacques,* 924 P.2d 898, 902 (Utah App.1996) (quoting *State v. Knight,* 734 P.2d 913, 920 (Utah 1987)). Reversal is inappropriate when compelling evidence supports the conviction. *Payne,* 964 P.2d at 334.

At trial, defendants readily admitted that they had chained J.G. to a brick in the basement. Indeed, as they acknowledge in their brief, they were quick to admit to their conduct, even after they were given their Miranda warnings by investigating officers. *See, e.g.*, Aplt. Br. at 25.[4] The defendants' fundamental strategy at trial was that they honestly believed they were justified in chaining J.G. to keep him from running away; in fact, they went so far as to claim that Deputy Timpson told them chaining was warranted under the circumstances. *See, e.g.,* TT 94.

On appeal, defendants claim that the jury should have been given a lesser-included offense instruction on class A misdemeanor child abuse, which is committed by infliction of

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[4] However, although both defendants acknowledged chaining J.G. in the basement, they both consistently minimized the extent of their conduct. For example, when first confronted by Deputy Lee in the fall of 2003 about the chaining, Mark Gray stated that they had only been chaining J.G. for about a month. TT 98. This testimony is inconsistent with J.G.'s own testimony as well as that of other witnesses, such as Alyce Johnson, who testified that she saw J.G. chained in the summer of 2002. TT 37-38. Additionally, Christina Gray later acknowledged that "I made a mistake when I supported Mark's decision to use the chain" and that she felt guilty about using the chain. *See* Parenting of Mark and Christina Grey, MGP 112, at 2.

serious physical injury upon a child through *criminal negligence.*[5] Utah Code Ann. § 76-5-109(2)(c) (West 2004). Under Utah law, a person is criminally negligent regarding "circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint." Utah Code Ann. § 76-2-103(4) (West 2004).

By contrast, a defendant commits second degree felony child abuse if he or she *intentionally or knowingly* inflicts serious physical injury upon a child. Utah Code Ann. § 76-5-109(2)(a) (West 2004); *see also, e.g.,* Jury Instruction 16 (MGP 92, CGP 101). The terms "intentionally" and "knowingly" are defined as follows:

> A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

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[5] "Serious physical injury" is "any physical injury or set of injuries which seriously impairs the child's health, or which involves physical torture or causes serious emotional harm to the child, or which involves a substantial risk of death. . ." Utah Code Ann. § 76-5-109(1)(d) (West 2004). "Serious physical injury" includes "any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function," Utah Code Ann. § 76-5-109(1)(d)(vii) (West 2004), and "any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life." Utah Code Ann. § 76-5-109(1)(d)(x) (West 2004).

> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Utah Code Ann. § 76-2-103. According to the Utah Supreme Court, intentional or willful "means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently . . . Willful, when applied to the intent with which an act is done or omitted, implies a willingness to commit the act. . . . *Willful does not require an intent to violate the law or to injure another or acquire any advantage.*" *State v. Larsen*, 865 P.2d 1355, 1358 n.3 (Utah 1993) (citations omitted; emphasis added); *see also State v. Norton*, 2003 UT App 88, ¶ 20, 67 P.3d 1050 (defendant need not intend to violate the law; rather, he need only intend to "do the prohibited act"). Similarly, "a person does not need to 'form the intent to commit a specific crime or intend the result that occurred to be found guilty of knowingly committing a crime.'" *State v. Ottwell*, 779 P.2d 500, 504 (Mont. 1989) (citation omitted).

If defendants' attorneys had requested a jury instruction on misdemeanor child abuse, the trial court first had to determine whether it was a lesser-included offense. Class A misdemeanor child abuse is a lesser-included offense because its elements are identical to second-degree felony child abuse, except for the element of intent. *See State v. Carruth*, 1999 UT 107, ¶ 16, n.9, 993 P.2d 869 ("'the distinction between the [greater and lesser offense] must be based upon the degree of risk or injury to person or property or upon grades of intent or degrees of culpability'") (quoting *McElhanon v. State*, 948 S.W.2d 89, 91 (Ark. 1997)). Thus, if a lesser-included offense had been requested, the trial court would have had

to "'decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury.'" *State v. Knight*, 2003 UT App 354, ¶ 10, 79 P.3d 969) (quoting *State v. Baker,* 671 P.2d 152, 160 (Utah 1983)), *cert denied* 84 P.3d 239 (Utah 2004). "'[W]hen the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser, a jury question exists and the court must give a lesser included offense instruction at the request of the defendant." *Id.* (brackets in original).

The evidence supporting the convictions of second degree felony child abuse or that the defendants acted intentionally or knowingly was very strong. Numerous people testified to the fact that J.G. was chained to a cinder block in the basement; many witnesses had seen him firsthand. *See, e.g.,* TT 38, 45, 76 (Alyce Johnson), 76, 77, 82 (Deputy Lee), 423 (Colleena Norman), 431-32 (Jason Kass). Additionally, the chain, cinderblock, the rug upon which J.G. slept were all seized by police and offered into evidence at trial. TT 115, 133, 165-171. Some investigators also testified to seeing marks on J.G.'s ankles. TT 109, 163.

J.G. testified that although he was released to go to school and to come upstairs for his meals, he spent a large amount of his time in restraints. TT 234-236, 241. He also testified that his father sometimes took him upstairs to eat, but that he otherwise spent "[a]ll day and all night" chained in the basement. TT 236. Defendants often kept him in his underwear on the cement floor of the laundry room hallway with access to little more than a rug and a blanket. TT 239-40. J.G. claimed that Christina sometimes threw water and turned a fan on him while he was chained and that she sometimes hit and kicked him. TT 239, 270. He also

claimed that Christina struck him with a board, repeatedly stabbed at him with a fork, and threw jalapeno pepper juice in his eyes. TT 241-42, 270.

Other evidence corroborated his testimony. J.G. showed one investigator a scar with four dots, three in a line and one slightly offset. TT 160. The investigator stated that the dots were consistent with a fork. *Id.* J.G. pointed to the unaligned dot and explained that one prong of the fork was bent. *Id.* J.G. also told the investigator that he had hidden a jar of peanut butter in the basement because he "was hungry and Christina wasn't feeding [him]." TT 134, 237. During a later search, the investigator found the jar where J.G. said he had placed it, "a place where you couldn't get to unless he described it." TT 160.

As to the length of time J.G. was chained, Alyce Johnson, a family friend, testified to seeing J.G. chained to a cinder block in the basement as early as summer 2002. TT 37-38. More than a year later, Deputy Michael Lee responded to the Gray residence and found only children at home alone. TT 75. When he asked to see J.G., a 13-year-old girl eventually produced him and a pair of handcuffs. TT 76. One of the children also candidly acknowledged that the handcuffs were used to chain J.G. in the basement. TT 86. Deputy Lee testified that he went into the basement of the home and found in the hallway a cinder block, a chain, a braided rug over the cement floor, a thin pillow and a towel. TT 77, 82-85. A week later, police returned with a search warrant and seized the block, chain, rug and

pillow, many of which had been moved to various places around the home, garage and yard.[6] TT 115, 132-33, 165-68, 171.

It is true that defendants disputed some of these claims. Coleena Norman, the teenager who lived with the Grays during 2003, testified that J.G. was chained intermittently over a three-month period and only when adults were not present to prevent him from running away. TT 423. Jason Kass, another family friend who lived with the Grays, stated that he saw J.G. chained "very few times." TT 431. He also testified that he never saw Christina beat or stab J.G.; rather, she only punished him by taking privileges away. TT 432. He also said that he had never seen Christina place a blanket or towel over J.G.'s head at the drive in. TT 434.

Defendants maintained, both at trial and on appeal, that they honestly believed they were justified in chaining J.G. to keep him from running away and potentially harming himself. "[T]he Grays felt they were trying to protect J.G. from harming himself by running away. The defense argued that the Grays never tried to conceal the fact that they were chaining J.G. from anyone, including church acquaintances, friends, neighbors, and even police officers." Aplt. Br. at 24-25. They also argued that part of the reason they believed they were justified was that Deputy Timpson allegedly gave them permission. *Id.*

In view of the foregoing, the defendants were not entitled to a lesser-included offense instruction because the evidence neither supported an acquittal on the charged nor conviction

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[6] The pillow, for example, was found inside the doghouse in the back yard. TT 168.

on the lesser. First, the defendants' claim that they believed they were justified does not negate the *mens rea* for the crime. As noted above, willful or intentional conduct does not necessarily involve "an intent to violate the law or to injure another or acquire any advantage." *Larsen*, 865 P.2d at 1358 n.3. Rather, the defendants needed onlyto intend to "do the prohibited act," in this case chaining J.G. in the basement. *Norton*, 2003 UT App 88 at ¶ 20. Thus, even if defendants did not know they were violating the law, they could still be held accountable for intentionally and knowingly committing the acts that constituted second degree felony child abuse.

Second, defendants would not have been entitled to an instruction on criminally negligent child abuse because there was no evidence that they were negligent. As noted above, a defendant is criminally negligent when he or she fails to perceive a "substantial and unjustifiable risk [and] . . . the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint." Utah Code Ann. § 76-2-103(4) (West 2004). The evidence at trial did not indicate defendants were unaware of the risk of harm to J.G. from chaining; rather, they argued that they were *justified* in chaining J.G. in order to prevent a different harm. Defendants' theory has always been that they were blameless because they had no choice but to chain J.G. This does not entail, however, that they were oblivious to the harm they were causing to J.G.[7] They simply chose what they afterward claimed was the lesser of

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[7] Indeed, it seems impossible that any parent would not be aware of the harm that could result from chaining a child in the basement on the floor for long periods of time.

two evils. Accordingly, their actions cannot be merely criminally negligent and they were not entitled to the lesser-included offense instruction.

C. Defendants Suffered No Prejudice.

Even assuming *arguendo* that defendants were entitled to a lesser-included offense instruction, they suffered no prejudice because, as recounted above, there was ample and largely unrebutted testimony that their actions in chaining J.G. in the basement were intentional and knowing. Because "compelling evidence supports the . . . conviction," "reversal is inappropriate." *See Payne,* 964 P.2d at 334; *see also Jacques,* 924 P.2d at 902 ("For an error to require reversal, 'the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.'") (citation omitted). Accordingly, defendants' claim of ineffective assistance of counsel must fail.

II. DEFENDANTS' TRIAL ATTORNEYS WERE NOT INEFFECTIVE IN NOT RETAINING AN EXPERT TO TESTIFY ABOUT DEFENDANTS' MENTAL STATES.

Defendants claim their trial attorneys were ineffective "for failing to recognize the need to call [an] expert witness on Mark and Christina's behalf with respect to the element of 'intentionally and knowingly' causing harm to J.G." Aplt. Br. at 37. This claim is also without merit.

A. Testimony Concerning Defendants' Mental States Is Inadmissible.

Defendants' trial attorneys cannot be found deficient for not introducing an expert on their mental states because such testimony is inadmissible. Rule 704 of the Utah Rules of Evidence states unequivocally: "No expert witness testifying with respect to the mental state

or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact." Utah R. Evid. 704(b); *see also United States v. Morales,* 108 F.3d 1031, 1037 (9th Cir.1997) (identical federal rule 704 prohibits "testimony from which it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite *mens rea*") (italics in original). As one court stated: "'Courts have interpreted Rule 704(b) to prohibit both the prosecution and the defense from inquiring of expert psychiatrists whether the defendant, at the time of the crime, was able to appreciate the wrongfulness or the nature and quality of his acts.'" *United States v. Bennett,* 161 F.3d 171, 183 (3d Cir. 1998) (quoting *United States v. Brown,* 32 F.3d 236, 238 (7th Cir.1994)). Accordingly, defendants cannot demonstrate deficient performance or prejudice because any attempt to admit such testimony would have been futile.

B. Even If the Psychiatrist's Testimony Were Admissible, the Decision Not to Call an Expert Is a Strategy Decision and, Therefore, Cannot Establish Ineffective Assistance of Counsel.

Even if psychiatric expert testimony were admissible, defendants' claim that their attorneys were ineffective in not calling such an expert is meritless because introducing expert testimony is a strategic decision within the discretion of counsel.

Defendants claim their trial attorneys should have retained someone like Lawrence D. Beall, a Ph.D. psychologist and director of the Trauma Awareness & Treatment Center, who prepared a psychological assessment of both defendants at their behest for sentencing

purposes. *See* MGP 112, CGP 120. According to defendants, "Dr. Beall's overall assessment of Mark and Christina does not attempt to controvert Dr. Corwin's determination that chaining is in the realm of psychological abuse/maltreatment, but instead explains how the chaining *could have occurred* by the Grays, whom Dr. Beall assessed to have 'no evidence of malicious intent.'" Aplt. Br. at 35-36 (emphasis added in original).

As noted in section II.A., above, such testimony concerning the defendants' intent is not admissible under the Utah Rules of Evidence. However, some testimony concerning defendants' mental condition might be admissible for some other purpose. "[E]xpert testimony is admissible if it merely 'support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony.'" *United States v. Bennett,* 161 F.3d 171, 183 (3d Cir. 1998) (citation omitted), *cert. denied* 528 U.S. 819 (1999). Thus, assuming defendants could have fashioned Beall's testimony in a way that did not violate rule 704, some portions of it may have been admissible.

Nonetheless, even assuming Beall's testimony was admissible, there are a number of reasons why defendants' trial attorneys cannot be found ineffective. First, defense counsel generally cannot be found constitutionally deficient for not introducing expert testimony. "Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable." *State v. Kenley,* 952 S.W.2d 250, 266 (Mo. 1997) (en banc), *cert. denied*, 595 U.S. 1095. In assessing the reasonableness of representation, a

court should consider all circumstances surrounding the attorney's performance. *State v. Tyler,* 850 P.2d 1250, 1255 (Utah 1993) (citing *Strickland,* 466 U.S. at 689-90)). Under *Strickland*, trial tactics and strategies, including witnesses, objections and defenses are "within the prerogative of counsel and are generally left to counsel's professional judgments." *Id.* at 1256. "Furthermore, counsel's decision to call or not to call an expert witness is a matter of trial strategy, which will not be questioned and viewed as ineffectiveness unless there is *no reasonable basis* for that decision." *Id.* (citations omitted; emphasis added); *Barkell v. State*, 55 P.3d 1239, 1243 (Wyo. 2002) ("The decision not to call a witness is a strategic choice, normally within the judgment of counsel and will not be second-guessed with the benefit of hindsight . . ."); s*ee also State v. Hartman*, 754 N.E.2d 1150, 1177 (Ohio 2001) (defense counsel's decision to rely on cross-examination of state's expert instead of calling his own "should be viewed as a legitimate 'tactical decision' . . ."). Thus, there is strong presumption that defendants' trial attorneys were performing within constitutional limits in choosing not to call an expert and defendants have not overcome this presumption.

Second, such testimony from a psychologist would have been cumulative of that offered by other witnesses. Several other character witnesses, who described the Grays as loving, caring parents trying to cope with behavioral difficulties of a disturbed child, implicitly presented defendants' claim that they did not intentionally or knowingly harm J.G. With regard to the special challenges J.G. presented at his elementary school, the principal described the Grays as "very good. They recognized the problem." TT 359. "They were

very responsive to a kid that was in crisis." TT 380. Feleti Matagi, a DCFS evaluator, met with the Grays in 2003 after J.G. was removed from the home to determine whether the other children in the home were in danger. TT 391-92. He ultimately recommended that the remaining children remain in the home. TT 394. A neighbor described Christina Gray as a normal "stay-at-home mom[]" who treated J.G. just like the other children. TT 447, 449-51. Thus, any additional evidence concerning defendant's intentions for an expert would have been merely cumulative.

Finally, testimony from an expert that the Grays sincerely believed they had to chain J.G. for his own good does not negate the intent necessary for commission of second degree felony child abuse. As argued in section I.B., above, the claim that defendants believed they were justified in chaining J.G. does not mean they did not intentionally or knowingly inflict serious physical injury upon a child. *See* Utah Code Ann. § 76-5-109(2)(a) (second degree felony child abuse). Moreover, the psychological assessments rarely directly address the chaining of J.G. and when they do, they generally acknowledge that the chaining was a mistake. For instance, one of the parenting assessments frankly states: "When a solution was inferred that seemed like the only feasible one left (i.e., restraints), they used it. As they have admitted to the evaluator, these restraints were a mistake." Parenting of Mark and Christina Gray, MGP 112, at p. 2. The report states that Christina Gray felt guilty about the chaining and quotes her as saying, "I made a mistake when I supported Mark's decision to use the chain." *Id.*

In short, defendants have not overcome the strong presumption that the decision not to call an expert witness was reasonable trial strategy and, therefore, constitutionally sound. Accordingly, defendants' claim of ineffective assistance of counsel fails.

III. INSTRUCTING THE JURY THAT THE DEGREE OF PROOF NECESSARY FOR CONVICTION "OBVIATES ALL REASONABLE DOUBT" DID NOT VIOLATE DEFENDANTS' DUE PROCESS RIGHTS.

Defendant claims that the reasonable doubt instruction given at his trial violated his due process rights under the United States Utah Constitutions. *See* Aplt. Br. at 40. That reasonable doubt instruction, in compliance with *State v. Robertson*, 932 P.2d 1219 (Utah 1997), *overruled in relevant part by State v. Reyes*, 2005 UT 33, 116 P.3d 305, informed the jury that "[p]roof beyond a reasonable doubt is that degree of proof that satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it, and obviates all reasonable doubt." Jury Instruction No. 8, MGP 84; CGP 93 (Addendum A). However, after trial, the Utah Supreme Court "expressly abandon[ed]" the ""obviate all reasonable doubt' element of the *Robertson* test." *State v. Reyes*, 2005 UT 33, ¶ 30, 116 P.3d 305.

Relying on *Reyes*, defendant argues that the "risk inherent in the use of the phrase 'obviate all reasonable doubt'" may have led to violation of the defendants' due process rights. Aplt. Br. at 40. For the reasons set forth below, this argument fails.

A. Because Defendants Approved of the Jury Instruction They Now Challenge on Appeal, Their Claim Is Invited Error and Should Not Be Considered.

Because defendants approved the reasonable doubt instruction, they cannot challenge it on appeal. "[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Anderson,* 929 P.2d 1107, 1109 (Utah 1996) (internal quotation and citation omitted). "Accordingly, a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (quoting *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111).

In *Geukgeuzian*, the Utah Supreme Court reviewed its caselaw and enumerated several examples of invited error. *Id.* at ¶ 10. A defendant invites error when his counsel "confirm[s] on the record that the defense had no objection to the instructions given by the trial court." *Id.* (citing *Hamilton*, 2003 UT 22 at ¶ 55). A defendant also invites error where he fails to object to an instruction when asked specifically by the court. *Id.* (citing *Anderson*, 929 P.2d at 1108-09) Finally, a defendant invites error when his counsel represents to the court that she read the instruction and had no objection to it. *Id.* (citing *State v. Medina,* 738 P.2d 1021, 1023 (Utah 1987)).

Similarly, here, defendants invited the alleged error concerning the reasonable doubt instruction. Before the trial began, defense counsel informed the judge that they had reviewed the proposed instructions submitted by the State and that "we seem to have been

playing from the standard play book. Everything t hat I was going to submit is what they've already submitted so we would stipulate to what they've already given you." TT 1. Then, toward the trial's conclusion, the judge again reviewed the instruction with both parties. TT 436-444. Defense counsel voiced concern specifically about three instructions—one concerning the defendants' right not to testify, another about conforming the font to be consistent throughout and about some minor rewording of one instruction. TT 439-40, 443. Each of these concerns was addressed to defense counsel's satisfaction. TT 444. Following a final discussion with counsel for the State and the defense, the judge made a concluding query: "[I]f anyone has any objections to the instructions, speak up now or forever hold your peace. I don't hear anything." TT 463.

Clearly, defense counsel "confirmed on the record that the defense had no objection to the instructions given by the trial court." *Geukgeuzian*, 2004 UT 16 at ¶ 10, (citing *Hamilton*, 2003 UT 22 at ¶ 55). Thus, any error was invited and defendants cannot challenge the reasonable doubt instruction on appeal.

B. Defendants' *Reyes* Claim Is Unpreserved and Does Not Constitute "Exceptional Circumstances."

Defendants' *Reyes* challenge is not properly before this Court. "As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. "Utah courts require specific objections in order to 'bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'" *State v. Hardy*, 2002 UT App 244, ¶ 14, 54 P.3d 645 (quoting *State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993)). To preserve a claim, a defendant must specify

the alleged error so that the trial court can "'assess [the] allegations by isolating relevant facts and considering them in the context of the specific legal doctrine placed at issue.'" *Id. at* ¶ 15 (quoting *Brown*, 856 P.2d at 361). "[T]he preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *Holgate*, 2000 UT 74 at ¶ 11. The exceptional circumstances exception is "ill-defined . . . and applies primarily to rare procedural anomalies." *State v. Dunn*, 850 P.2d 1201, 1209 n. 3 (Utah 1993).

Defendants concede that trial counsel did not preserve the issue they raise. *See* Aplt. Br. at 40. However, they argue that the fact that *Reyes* was not decided until after their trial constitutes an exceptional circumstance excusing their failure to preserve the claim. *See* Aplt. Br. at 41. In effect, they argue that they could not object at trial, because the basis for the objection did not yet exist.

This very argument was rejected by the Utah Supreme Court in *State v. Lopez*, 886 P.2d 1105 (Utah 1994). Lopez was tried for sex crimes against a child. On appeal, he argued that a photo array was impermissibly suggestive under state due process principles announced in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). *Lopez*, 886 P.2d at 1113. At trial, Lopez had not objected on this ground, as *Ramirez* had not yet been decided. *Id.* On appeal, the supreme court had to "determine whether Lopez may now raise that issue on appeal." *Id.* The court held that "Lopez cannot raise the issue of state due process for the first time on appeal because he has not demonstrated that the 'plain error" or 'exceptional circumstances' exceptions exist." *Id.*

The case at bar is indistinguishable. Nothing prevented defendants from challenging the reasonable doubt instruction even before *Reyes* was decided. In *Reyes* itself, the State argued that the *Robertson* three-part test was unconstitutional, despite the absence of any authority declaring it unconstitutional. Moreover, this Court, in an opinion issued before defendants' trial, described the *Robertson* three-part test as "constitutionally flawed" and "not consistent with United States Supreme Court precedent." *See State v. Reyes*, 2004 UT App 8, ¶¶ 22, 30, 84 P.3d 841.[8] Nothing prevented defendants from preserving this issue by making this argument at trial. Accordingly, the claim is barred.[9]

C. Defendants' *Reyes* Challenge Fails Because the Prosecutor Did Not Argue that the State Needed To Refute Only "Doubts That Are Sufficiently Defined."

Even if defendants' claim were reviewable by this Court, it still lacks merit because the due process danger identified in the *Reyes* opinion did not arise here.

The reasonable doubt instruction given at trial, reproduced here in its entirety, contained the phrase "obviates all reasonable doubt":

> All presumptions of law, independent of evidence, are in favor of innocence, and defendants are presumed innocent until they are proved guilty beyond a reasonable doubt. And, in case of a reasonable doubt as to whether his or her guilt is satisfactorily shown, he or she [is] entitled to an acquittal.

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[8] This Court issued *Reyes* on January 15, 2004. Defendants were tried in September 2004.

[9] Defendant does not claim that this Court can review his challenge to the reasonable doubt instruction because the error was structural. *See* Br. Aplt. at 37-41. Whether failure to object to a reasonable doubt instruction forecloses a claim of structural error is a question the supreme court left unresolved in *State v. Cruz*, 2005 UT 45, ¶ 18, 122 P.3d 543.

> I have heretofore told you that the burden is upon the State to prove the defendants guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Now by reasonable doubt is meant a doubt that is based on reason and one which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt that is merely fanciful or imaginary or based on a wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof that satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it, and *obviates all reasonable doubt.* A reasonable doubt is a doubt that reasonable men and women would entertain, and it must arise from the evidence of the lack of the evidence in this case.

MGP 84; CGP 93 (emphasis added) (Addendum A).

The *Reyes* court found the "'obviate all reasonable doubt'" concept to be "[i]nsightful and important," yet "linguistically opaque and conceptually suspect." *Reyes*, 2005 UT 33 at ¶ 26.

> The process suggested by the "obviate all reasonable doubt" standard is also flawed because, contrary to its purpose, it tends to diminish the degree of proof necessary to convict and in that respect violates the *Victor* [*v. Nebraska*, 511 U.S. 1 (1994),] standard. The "obviation" of doubt contemplates a two-step undertaking: the identification of the doubt and a testing of the validity of the doubt against the evidence. This process suggests a back and forth disputation of a doubt's merits, all to the end of determining whether the evidence is sufficient to "obviate" the doubt. The "beyond a reasonable doubt" standard does not, however, condition a conclusion that a doubt is reasonable on an ability either to articulate the doubt or to state a reason for it.

Id. at ¶ 27. The court concluded, "[t]o the extent that the *Robertson* 'obviate' test would permit the State to argue that it need only obviate doubts that are sufficiently defined, the test works to improperly diminish the State's burden." *Id.* at ¶ 28.

Reyes thus holds that the "obviate test" diminishes the State's constitutional burden of proof *only* to the extent it would "permit the State to argue that it need only obviate doubts

that are sufficiently defined." *Id.* Consequently, where the State does not argue that it need only obviate doubts that are sufficiently defined, the test does not diminish the State's constitutional burden.

Defendants here do not claim, nor does the record disclose, that the prosecutor argued that the State need obviate only those doubts that are "sufficiently defined." *See* Aplt. Br. at 37-41. In fact, the prosecutor never discussed the burden of proof at all during his opening or closing arguments. *See* TT 14-17, 482-86, 502-510. Even when reviewing the elements instruction, the prosecutor never discusses reasonable doubt or makes any reference to the State's burden of proof. Clearly, the prosecutor did not argue that the State need not refute any doubts because they were not "sufficiently defined." *Reyes*, 2005 UT 33, ¶ 28.

Defendant's claim fails for another reason. "[S]o long as the reasonable doubt instructions, 'taken as a whole, . . . correctly convey[ ] the concept of reasonable doubt to the jury,' they pass constitutional muster." *State v. Cruz*, 2005 UT 45, ¶ 20, 122 P.3d 543 (quoting *Victor v. Nebraska*, 511 U.S. 1, 22 (1994)). "Simply put, [the court] need only ask whether the instructions, taken as a whole, correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id.* at ¶ 21 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). In *Cruz*, the supreme court approved a reasonable doubt instruction containing the sentence, "The law does not require that the evidence dispel all possible or conceivable doubt, but rather that it dispel all reasonable doubt." *Id.* at ¶ 11. In the context of reasonable doubt instructions, "dispel" and

"obviate" are synonyms. So in effect, the *Cruz* jury, like the jury here, was told that the State must "obviate all reasonable doubt." Yet the Supreme Court approved the instruction.

The jury instructions here "pass constitutional muster" because, "taken as a whole," they "correctly convey[ed] the concept of reasonable doubt to the jury." *Cruz*, 2005 UT 45, ¶ 20 (internal quotation marks and citation omitted). This concept was conveyed not only by the reasonable doubt instruction quoted above, but also by others. *See, e.g.,* Jury Instruction No. 2 (CGP 86) ("The plea of not guilty denies each and all of the essential allegations of the charge contained in the Information and casts upon the State the burden of proving each and all of the essential allegations thereof to your satisfaction and beyond a reasonable doubt."); Jury Instruction No. 14 (CGP 99) ("If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant Christina L. Gray, guilty of Child Abuse as charged in the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find her not guilty.").

In sum, even if defendants' claims were not waived, they fails on the merits.

CONCLUSION

For the foregoing reasons, this Court should affirm the defendants' conviction.

RESPECTFULLY SUBMITTED this 30th day of December, 2005.

MARK L. SHURTLEFF
Attorney General

BRETT J. DELPORTO
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2005 I caused to be U.S. Mail two copies of the foregoing to:

Barton J. Warren
261 East 300 South, Suite 175
Salt Lake City, Utah 84111

Addendum A

INSTRUCTION NO. 8

All presumptions of law, independent of evidence, are in favor of innocence, and defendants are presumed innocent until they are proved guilty beyond a reasonable doubt. And, in case of a reasonable doubt as to whether his or her guilt is satisfactorily shown, he or she entitled to an acquittal.

I have heretofore told you that the burden is upon the State to prove the defendants guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Now by reasonable doubt is meant a doubt that is based on reason and one which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt that is merely fanciful or imaginary or based on a wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof that satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it, and obviates all reasonable doubt. A reasonable doubt is a doubt that reasonable men and women would entertain, and it must arise from the evidence or the lack of the evidence in this case.